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South Australian Industrial Relations Court Decisions

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INDUSTRIAL RELATIONS COURT (SA)

← MOORE →, Ashleigh

v

ADELAIDE BRIGHTON CEMENT LIMITED

JURISDICTION: Appeal

FILE NO/S: 7071 of 2003

HEARING DATES: 13 February 2004

JUDGMENT OF: His Honour Judge JP McCusker

DELIVERED ON: 10 November 2004

CATCHWORDS:

Appeal - Alleged failure to provide safe system of work - Alleged failure to provide adequate information, instruction, training or supervision - Defendant engaged independent contractor to carry out repair work on one of its ships - Employee of independent contractor fatally injured while performing this repair work - Whether such repair work was a "matter over which" the defendant had "control" as envisaged by s 4(2) of the Act - Statutory construction - Meaning to be attributed to the word "control" - Appeal dismissed - Ss 4(2), 19(1) [Occupational Health, Safety and Welfare Act 1986](#).

Complete Scaffold v Adelaide Brighton Cement & Another [\[2001\] SASC 199](#)

REPRESENTATION:

Counsel:

Appellant: Mr J Powell

Respondent: Mr H Dixon SC, with him Ms K Noyen

Solicitors:

Appellant: Crown Solicitors Office

Respondent: EMA Legal

1 The Crown appeals the order of an Industrial Magistrate dismissing a complaint alleging the defendant failed to ensure the safety of the late Colin Hutchins in contravention of [s 19\(1\)](#) of the *Occupational Health, Safety and Welfare Act 1986* ("the [Act](#)"). The prosecution was related to the death of Mr Hutchins on 13 May 2000 when he was repairing a broken cable on the ship *Accolade II*. The failure is framed as an unsafe system of work and a lack of requisite information, instruction, training or supervision (AB 3). The appellant contends the Court misconstrued the intent of [s 4\(2\)](#) of the [Act](#). Instead it ought to have been satisfied beyond reasonable doubt that the defendant had "control" of the work.

2 Mr Powell, of counsel for the appellant, accepts the findings made by the Industrial Magistrate in his decision (tr 10). The defendant owned and operated a ship, the *Accolade II*. It transported limestone from Yorke Peninsula to Port Adelaide. On 12 May 2000 while the limestone cargo was being unloaded, a cable supporting the aft longitudinal scraper broke. The break caused the aft beam to drop on the port side and become wedged against the hold of the ship. The defendant tried to call on duty one of its own riggers. However none of the defendant's riggers were available. It therefore engaged a company called Macweld Industries Pty Ltd ("Macweld") to carry out the work. A job entry sheet was completed and a purchase order raised (Exhibit C9). As the summary of transactions in May 2000 included in that exhibit shows, Macweld frequently provided services to the defendant.

3 An employee of Macweld, Peter Hertzog, attended the *Accolade II* and inspected the situation in the company of the defendant's on-call mechanical supervisor, Ms De Nichilo a mechanical engineer. Also in attendance was a process operator employed by the defendant named McMahon. The Industrial Magistrate states:-

"12 McMahon recalled (tr 137, 138) that Hertzog seemed to be familiar with the job more so than himself and De Nichilo. Hertzog told them what was required and Hertzog rang Mertzanidis (at Macweld) to arrange another rigger and more labour. McMahon knew that other employees of Macweld were coming on site. Later he saw Colin Hutchins ('Hutchins') and he also became aware that Billy Jackson ('Jackson') would be coming to assist in the repair operation. Both Hutchins and Jackson are employees of Macweld. McMahon had no involvement whatsoever in the repair operation.

13 De Nichilo, as McMahon indicated, carried out an inspection before Hertzog arrived. She then carried out a second inspection in the presence of Hertzog. This inspection was conducted from the cross-scraper platform. De Nichilo stated that after she and Hertzog had made observations from this location a discussion followed regarding the positioning of the scraper and also what resources were required to carry out the repair work. De Nichilo said she was concerned about the weight of the scraper on the starboard wire and she together with Hertzog decided to lower the scraper as much as possible into the limestone cargo to provide support and take weight off the starboard side wire. ...

14 De Nichilo said (tr 206, 251) that Hertzog made an assessment as to what resources were required to carry out the repair operation. Hertzog's requirements included the provision of a crane, other

employees from Macweld possessing particular skills, and the tools that were required to perform the work. De Nichilo obtained details of the cable required and passed that information onto Hertzog. De Nichilo then left the site and indicated that as far as she was concerned Hertzog was in charge of the work to be undertaken. She did not return home at that stage but went to her office at the defendant's premises and carried out some paperwork. Before she left the defendant's premises to go home she inquired of Hutchins, who had come to the site, whether he needed anything further. She was contacted later in the morning of 13 May 2000 regarding the progress of the job and returned on board the Accolade about midday.

...

16 Throughout the repair operation Hertzog and Hutchins assessed what equipment and materials they might require and further called in additional resources when a welding cut was required. This involved further employees of Macweld, Serotski and Vaux. As Hertzog indicated (tr 361) he did not in any way look to De Nichilo for advice or instructions as to how the job should be performed because he regarded himself as a qualified rigger and able to perform the necessary work. He had on a number of prior occasions undertaken the task of cable replacement on the Accolade. Hertzog did indicate that he was aware that he could call upon the defendant or De Nichilo for any information that he required to enable him to carry out the work and further could request of the defendant or De Nichilo any additional equipment to enable the job to be carried out.

...

19 I was referred to written documentation in relation to the replacement of the broken cable (see Exhibits C9 and D5). In particular the purchase order of the defendant directed to Macweld forming part of Exhibit C9 confirms that the defendant required Macweld Industries to replace as required the damaged hoisting wires on the Accolade II aft longitudinal scraper. This type of engagement was contrasted with a labour only or labour hire arrangement which Macweld from time-to-time undertook with the defendant (see Exhibit D16). An explanation of the two types of work appears at tr 605. The explanation was that the position accepted by the parties is that Macweld has two types of work that it is called upon to do by the defendant. One type of work is where Macweld is given a project or a repair or maintenance job to carry out under Macweld's supervision and the other type is to provide qualified tradespeople to carry out repairs under the defendant's supervision which type of work is labour hire through Macweld and the defendant's purchase orders reflect that. The two purchase orders that make up Exhibit D16 are examples of purchase as labour hire through Macweld."

4 The critical provision for consideration on this appeal is [s 4\(2\)](#) of the [Act](#). That reads:-

"(2) For the purposes of this [Act](#), where a person (‘the contractor’) is engaged to perform work for another person (‘the principal’) in the course of a trade or business carried on by the principal, the contractor, and any person employed or engaged by the contractor to carry out or to assist in carrying out the work, shall be deemed to be employed by the principal but the principal's duties under this [Act](#) in relation to them extend only to matters over which the principal has control or would have control but for some agreement to the contrary between the principal and the contractor."

5 It is not an issue between the parties that the defendant was by reason of this provision the deemed employer of Hutchins (judgment par [25], appellant's outline par [3]). Moreover on the issue of "control" there was no "agreement" that would have attracted the operation of the last proviso in the subsection. The matter confines itself to whether, in the circumstances, the work the late Mr Hutchins was engaged in was a, "matter over which", the defendant had, "control". That involves a question of law namely the meaning and compass of the word "control" as used in the provision and the application of that meaning and compass to the facts of this particular case.

6 The appellant has framed its argument commencing with the statement of Doyle CJ in *Complete Scaffold v Adelaide Brighton Cement & Another* [2001] SASC 199 par [56] where his Honour stated "control" in s 4(2) should be read as referring to actual control, that is to things which the deemed employer is, "managing or organising". Using the words "managing" and "organising" the appellant claims the Industrial Magistrate reached the wrong conclusion and the actual duties Hutchins was engaged in constituted matters over which the defendant had control. I will set out the factors the appellant pointed to in this respect as they form the gravamen of the Crown's case (see outline par [5], tr 7):-

- (i) The defendant owned and operated the ship *Accolade II*.
- (ii) The defendant had all requisite information as to the equipment failure and what had to be done to repair the cable system.
- (iii) The defendant's site supervisor/engineer De Nichilo had inspected the failure.
- (iv) The defendant chose to engage Macweld to do the repair job.
- (v) The defendant provided all plant and replacements needed to do the job.
- (vi) It was the defendant's decision that Macweld, and hence Hutchins, would provide the labour for carrying out the repair. This is the sense in which I understand the statement in para [6] of the outline (see tr 9).
- (vii) De Nichilo was on-site and observing the operation when the fatal accident occurred.
- (viii) De Nichilo had authority, though not exclusively, to give directions or suggestions as to the task being undertaken and to bring the work to a halt if she chose (tr 10).

7 I set out what the Industrial Magistrate concluded in his reasons for judgment. He stated:-

"44 ... I do not accept the complainant's submission that managing and organising does not include performing the actual job. Indeed as the Chief Justice stated when addressing the factual situation in *Complete Scaffold* namely the erection of scaffold by a specialist independent contractor (para 70):-

'In my opinion the placement of scaffolding was not something over which ABC had control. ABC was not carrying out the work, or supervising it.'

45 From the totality of the evidence it is in my view clear that the defendant contracted with Macweld to assess, organise, resource (albeit using the defendant's tools, materials and equipment) and undertake the repair operation in its totality. This was not a supply labour only situation.

46 The defendant engaged the services of Macweld to undertake the repair work namely the replacement of the cable supporting the aft longitudinal scraper aft beam. The fatal injuries sustained by Hutchins resulted from the sudden tensioning of the starboard cable during the winching process following the replacement of the cable. Control over the repair task rested with Macweld as the expert contractor hired to perform the work."

8 To further understand the material before the Court I set out part of the evidence of De Nichilo (trial tr pp 262 - 264):-

"Q All right. You said in answer to a question this morning that in relation to the authority to stop work on the Birkenhead site that the company's position, as I understood your evidence, is that anyone can stop work if that person takes the view that what is happening is unsafe.

A Yes.

Q As at 13 May, you regarded that as applicable to you as an employee.

A That's right.

Q Also you mentioned the occupational safety and health legislation. Your understanding of that at that time was that any individual employee also had that right complying with their statutory obligations. Is that right.

A That's right.

Q Apart from those rights, you did not see yourself as having a separate right on the day to stop the work being carried out by the Macweld employees.

A If I saw something that I thought was unsafe and I understood to be a hazard, I would have done something about it.

Q But that was not in a separate capacity. It was in your capacity as an employee with the right to stop the work.

A That's right.

Q The general right.

A Yes.

Q On 13 May, did you regard yourself as having the authority to tell Messrs Herzog, Hutchins and the others how to perform the job.

A I may have had the authority but certainly not the experience or the skill - or the training - to be able to tell them how to perform their roles.

Q But you didn't have the authority to tell them - for example, you didn't engage Messrs Serotzki and Vaux.

A No.

Q You had left that task to them in their entirety, had you not.

A That's right.

Q And you had left control of the job to the Macweld employees in their entirety.

A Yes.



Q As a result, you did not have the authority to tell them how they should go about performing the particular job.

A No."

9 One of the mainstays of Mr Powell's argument was that had one of the defendant's riggers been on duty, then the defendant would unarguably have been "in control" (tr 11). However that is somewhat

revealing as to the actual circumstances. In contrast to the situation that would have existed if the defendant's riggers had been performing the repair, the situation meant once Macweld took the job, the relevant or requisite control was, in the particular circumstances, with it and the defendant had chosen to leave "the matter" to them.

10 Both parties acknowledged that the decision of *Complete Scaffold* dictated the approach to be taken. Mr Dixon SC, counsel for the respondent, contended the facts in *Complete Scaffold* were important if one was to appreciate the ruling and the employment of the ruling to other cases (tr 36). In particular the general obligation on everyone to take responsibility for safety was the same in the *Complete Scaffold Case* as in the subject appeal (tr 38). *Complete Scaffold*, like Macweld, was a company providing qualified and specialist services. It had worked regularly for Adelaide Brighton Cement (judgment par [8]). Adelaide Brighton Cement was fully aware of what was to be done in the particular case (judgment par [11]). Adelaide Brighton Cement left it to the contractor as to how it would carry out the work so long as the workers involved had undergone a safety induction procedure regarding the worksite. However in contrast to the subject appeal where the defendant had its own riggers in the *Complete Scaffold Case* Adelaide Brighton Cement had no scaffolders among its employees and any such work was always contracted out.

11 Important for an understanding of the *Complete Scaffold Case*, is the conclusion that leaving the particular job for the specialist contractor to do was appropriate given that company's specialist skill and qualifications. In other words, control being vested in the contractor was warranted given the circumstances, (judgment pars [34], [36]). Mr Dixon SC emphasised in his submissions that in the *Complete Scaffold Case* Adelaide Brighton Cement had a Mr Mudge, the site supervisor, and a safety officer, Mr  Moore , observing the operation at the time the accident happened, (judgment par [17], p 38 of appeal tr).

12 In the *Complete Scaffold Case*, the Chief Justice in considering the meaning of [s 4\(2\)](#) of the [Act](#), gave a number of examples which if caught by the provision he regarded as extraordinary (judgment par [51]). These included a contractor cleaning the offices of a business, an accountant retained by the business for advice or a solicitor engaged to give legal advice. Even a shop owner engaging an electrician to install an electrical fitting in the shop. Such a range was "as to make me think that such a meaning could not have been intended". But he concluded such a scope indeed was the intent. It was in this context that the meaning of "control" in the proviso had to be understood. In the *Complete Scaffold Case* the worker's injury resulted from a casual act of negligence by a scaffolder who put two planks in place without making adequate inquiry as to how they would be used and without considering the risk. That discrete matter was something over which Adelaide Brighton Cement had no actual control (judgment par [55]). His Honour stated:-

"56 'Control' in s 4(2) of the OHSW [Act](#) should be read as referring to actual control, that is to things which the deemed employer is managing or organising. Unless [s 4\(2\)](#) is limited in this way, its reach would be very great. Control over this task rested with Scaffolding, as the expert contractor hired to perform the work. ...

(See also par [70].)

13 A further argument was put by Mr Dixon SC. He contended the Crown's argument amounted to holding responsible those involved in the steps preceding the performance of the actual task. That was the essence of all of the eight points enumerated by the Crown. That is save the authority to stop the work which was explained by the testimony of De Nichilo at pp 262 - 264 of the trial transcript. This argument he said failed to appreciate the notion of "actual control" used by the Chief Justice (tr 40). The concept in the provision was also not to be confused with notions of vicarious liability (tr 41). Nor was it to be confused with notions of a "right to control" or "ultimate authority in the matter" in the sense used in contract of employment law. In the words of the Chief Justice (judgment par [70]) the statutory language suggests that reference to "control" is not intended to encompass "an

activity in which the principal (ABC) is involved and could control, but control over which the principal has placed in someone else". That was the case here.

14 In my opinion the respondent's contentions as to the understanding of the decision of *Complete Scaffold* are correct. The notion of "control" here is given a narrow and "actual" meaning. That does not suggest by the mere engagement of an independent contractor a defendant will avoid the obligations in [s 19\(1\)](#) by reliance on the proviso. But the purpose of the legislation is to sheet home the responsibility for safety to the person appropriately and actually possessed of the control.

15 The appeal is dismissed.

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